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ABSTRACT

Developments over the past 25 years in school-related legal issues in elementary schools have significantly changed the principal's role. In 1975, a decision of the U.S. Supreme Court established three due-process guidelines for short-term suspension. The decision requires student notification of charges, explanation of evidence, and an informal hearing. Principals should create a written discipline code incorporating these elements and any applicable state laws. In the area of corporal punishment, the Supreme Court has examined both constitutional issues--cruel and unusual punishment--and due process, and tort law. And while corporal punishment is constitutionally permitted with certain restrictions, even following applicable laws and guidelines does not eliminate the possibility of litigation arising from its use. Negligence torts and intentional torts are the two most common forms of tort liability experienced by principals. Safeguards against such tort cases can include effective supervision of school activities, inservice sessions on supervision for teachers, supervisory staff monitoring, and routine safety checks of equipment and facilities. Principals should also be concerned about legal issues in a relatively new area, special education. The changing characteristics of the family also present legal problems in the areas of student records and custody issues. (Contains 13 references.) (JPT)

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#7 The Principal and The Law

by David E. Doverspike
and W. Henry Cone

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Elementary Principal Series

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Elementary Principal Series No. 7

The Principal and the Law

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Introduction

In July 1989, Assistant Administrator David Elsass of the Lake Local Schools in Stark County, Ohio, was convicted of child endangering as a result of paddling a 10-year-old boy. Elsass' conviction marked the first time that an Ohio school administrator had been convicted on a criminal charge resulting from a paddling, even though his board of education initially had supported his action by indicating that he had correctly followed local policy. Elsass was sentenced to house arrest for five days with an accompanying $250 fine. He also lost his administrative position. This incident is just one example of how elementary principals can find themselves quickly engulfed in legal controversies in today's public schools.

The elementary principal's role has undergone dramatic changes during the past 25 years. In earlier times, the principal advised teachers on how they could improve their teaching and also served as site manager, chief problem solver, and fiscal manager. In matters of building administration, the principal's hegemony was complete. Only occasionally were principals concerned with legal issues.

All of this changed in 1969 with the U.S. Supreme Court's ruling in *Tinker* v. *Des Moines Independent Community School District*, a case involving the suspension of three students for wearing black arm bands to protest the Vietnam War. With the Court's decision in *Tinker* upholding the students' First Amendment right of expression, the role of the principal was changed forever. In the traditional preparation of principals, there was little precedent to assist them with school-related litigation issues that began to skyrocket in the years following *Tinker*. Today, the job of the principal is fundamentally different as a result of this tide of litigation. The principal now is a *legal actor* and must therefore be a *legal expert* – at least in certain areas of the law.

Our purpose in writing this booklet is to help elementary principals become, if not legal experts, at least knowledgeable enough about school-related legal issues to guide them in making decisions affecting students and their families.

Student Discipline and Due Process

Fair and consistent student discipline has emerged as a legal issue in recent years. Until 1975, the traditional doctrine guiding school officials' relationships with students was known as *in loco parentis*. We stood "in place of the parents" while the child was under our supervision at school, and we exercised parental authority over them. While state legislatures and local school districts commonly provided minimum guidelines for disciplining students, the Supreme Court directly addressed the discipline issue in 1975 in *Goss* v. *Lopez*, a case involving due-process rights of students who were suspended. The Court's ruling in *Goss* marked the end of the *in loco parentis* doctrine – at least in its traditional interpretation.

The basis of due-process rights for students is found in the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment, ratified in 1868, extended the applicability of the Fifth Amendment to the states. For the protections of the two amendments to apply, however, an individual must have a life, liberty, or property interest that is threatened by governmental action.

Goss v. *Lopez* involved a student challenge to suspension procedures under Ohio law. Columbus school officials had suspended nine students – presumably for disrupting school operations – but had failed to inform them about what they had specifically done to warrant the suspensions. The students were given no opportunity to explain their version of events. In declaring Ohio's suspension statute unconstitutional, the Court held that public school students have both "liberty" and "property" interests in attending school. The Court set out three short-term suspension due-process guidelines. First, students must be given oral or written notice of the charges against them. Second, if the students deny the charges, school officials must explain the evidence against them. Third, the accused students must

be given an opportunity to present their own account of the disputed events.

Following the *Goss* ruling, state legislatures modified their discipline statutes to be consistent with requirements in *Goss*. Today, school districts across the nation have adopted student discipline codes that outline rules and procedures relating to disciplining students. To be upheld in court, these codes must be consistent both with state statutes as well as the *Goss* guidelines.

At first glance, the three due-process requirements in *Goss* hardly seem revolutionary. It is difficult to imagine imposing suspensions on students without first informing them of the offenses they have been charged with and giving them a chance to respond to the charges – even though this is what actually happened in *Goss*. The *Goss* requirement of an informal hearing, which encourages dialogue between student and disciplinarian, is easily satisfied. Additionally, by discussing the charges with the student and by giving the student an opportunity to respond, a principal may gain additional facts that could lead to a modification or cancellation of the punishment.

It is important that the district's discipline code be sufficiently flexible to apply to all levels of schools. For example, the code on suspensions may be written to apply primarily to secondary schools, but it should be sufficiently flexible to apply to rules violations in elementary school and with punishments appropriate for elementary students.

There is mounting evidence that lower courts are becoming more willing to extend the *Goss* due-process requirements beyond traditional short-term suspensions, for example, suspending students from participation in extracurricular activities, transferring students from building to building, providing student access to particular types of academic programs, and placement of students in special education programs.

Recommendations for Due Process

1. Initially, a written student discipline code consistent with the *Goss* requirements and any additional state statutory requirements should be established for your district as a whole, if it is not already in place. Since you will be administering the code on a daily basis, you should have a role in designing it. The same is true if the code is later modified.

2. You and other principals in your district must make every effort to apply the district's code uniformly. If students at school "A"

are routinely suspended for a given code violation while students at school "B" are not, both legal and public-relations problems may arise. For this reason, you need to be aware of the code's provisions and enforce them uniformly. Consistent administration of the discipline code is particularly important where punishments are graduated depending on the severity of the infraction. Inconsistent administration may give rise to charges of due-process and equal-protection violations.

3. The *Goss* due-process requirements are easily satisfied by allowing students to tell their side of the story in an informal hearing. There is nothing to be gained by being callous and arbitrary in disciplinary dealings with students. As commentators on *Goss* have suggested, the Court's emphasis on informality allows you great flexibility in conducting your school discipline program. The effective elementary principal who is concerned with enhancing school climate as well as maintaining discipline makes every effort to conduct informal hearings fairly.

4. Although *Goss* calls for only an informal hearing, it is still the law; and all principals are bound to follow its requirements. Violating a student's civil rights can make a principal liable under 42 U.S.C. 1983. Section 1983 permits an individual whose rights have been violated to collect money damages from individual defendants. Since 1975, cases have been litigated where violations of students' civil rights have been found and liability has been imposed on school officials. State sovereign immunity laws may shield you from liability in traditional negligence suits, but they do not apply to section 1983 suits, which are based on federal law.

Corporal Punishment and Student Discipline

Corporal punishment is a student discipline issue that encompasses both constitutional and tort law concerns. In the constitutional arena, the corporal punishment debate centers on two issues: "cruel and unusual punishment" and due process. The Supreme Court's landmark 1977 corporal punishment case, *Ingraham* v. *Wright*, turned out to be anything but the final word on the use of corporal punishment in schools. While it resolved the "cruel and unusual punishment" and procedural due-process issues, the Court failed to address the *substantive* due-process issue, which has been employed with some success in lower courts by corporal punishment opponents as a constitutional ground for relief.

The use of corporal punishment in today's litigation-prone atmosphere is fraught with risk. This risk is present even when attempting to use corporal punishment in a "reasonable" manner and when trying to follow board of education policy to the letter. Public opinion with regard to the use of corporal punishment is strongly divided. And the fact that some states and local school districts permit its use while others do not makes the issue one of continuing concern to all who administer school discipline – especially principals.

The Supreme Court's two corporal punishment cases, *Baker* v. *Owen* (1975) and *Ingraham* v. *Wright* (1977), have clarified some basic questions about its constitutionality. In *Baker* v. *Owen*, the Supreme Court affirmed, without opinion, a lower court decision setting out several guidelines for the use of corporal punishment that, if followed, ensure both constitutionality and reasonable administration. These guidelines include refraining from using corporal punishment as a first line of discipline, informing students ahead of time about which infractions will result in paddlings, having a second school official present as a witness during paddlings, and informing parents of the witness's identity on request. *Baker* v. *Owen* also states that in the absence of state laws or district policies to the contrary, parents cannot dictate preferred means of administering punishment.

In *Ingraham* v. *Wright*, the Court held that corporal punishment does not constitute "cruel and unusual punishment" under the Eighth Amendment since that amendment applies only to punishments in criminal settings, not to schools. And the due-process clause of the Fourteenth Amendment does not require notice and a hearing prior to administering corporal punishment. Additionally, the majority held that "traditional common law remedies" are available to the student who has been excessively punished; that is, the threat of a civil suit and possible criminal action against school officials is sufficient to protect the student's due-process rights in corporal punishment cases.

Two possible constitutional grounds for challenging the use of corporal punishment are the substantive due-process argument and the equal-protection argument. The substantive due-process issue, while argued before the *Ingraham* Court, was left unaddressed by the justices. As a result, it has survived as a possible constitutional ground for challenging the use of corporal punishment. While the lower courts are split on this issue, at least one circuit has recognized such a claim in *Hall* v. *Tawney* (1980). In this case a lower federal court held that if the corporal punishment amounts to a "brutal and inhumane abuse of official power" that is "literally shocking to the conscience," the paddled student's Fourteenth Amendment rights have been violated.

Another basis for constitutionally based relief originating in the Fourteenth Amendment survives in the "equal protection" argument. An example of this is *Coleman* v. *Franklin Parish School Board*. In an equal-protection challenge to the use of corporal punishment, the student plaintiff must prove that corporal punishment was administered differentially. In the *Coleman* case, the basis of the differential administration was the student's race. To win an equal-protection case, the student must plead and prove both intent and purpose to discriminate in the administration of corporal punishment.

Use of corporal punishment also can be challenged on the basis of tort law. There have been cases where the court found that the use of corporal punishment constituted battery committed against the child. Like the constitutional issues surrounding corporal punishment, "reasonableness" also is a factor in tort law cases. The courts, however, have been relatively unsympathetic to assault and battery claims in corporal punishment cases, provided the accused principal administered the punishment reasonably in light of all the circumstances.

Deciding Whether to Use Corporal Punishment

In deciding whether to use corporal punishment, you must address several threshold legal questions. First, is corporal punishment a permissible means of disciplining students under the laws of your state? Corporal punishment survives in 39 states and is prohibited in the remaining 11. Obviously, if state law precludes the use of corporal punishment, you may not use it as part of your discipline program. If state law does permit the use of corporal punishment, the second question is whether your district permits it. Even in states that permit corporal punishment under state law, a significant number of districts have limited or prohibited its use through local policy.

If the use of corporal punishment survives under both state law and local district policy, then you need to examine what policies your district has established to govern its use. And you must conform to those policies, even if they exceed the constitutional minimum requirements outlined in the *Baker* and *Ingraham* cases. If the district permits corporal punishment but has no established procedures to ensure "reasonable administration," it would be prudent to conform to at least the minimum guidelines set out in *Baker* and *Ingraham*.

These guidelines state that you should never permit corporal punishment to be used as the first line of disciplining students. Its use should be reserved for more serious as well as repeated deviations from appropriate school behavior. In addition, students always should be informed ahead of time about what specific misbehaviors will result in paddling. An efficient way of transmitting this information is through a written student discipline code, which can be distributed to students and parents at the beginning of each school year. The code should specify all inappropriate behaviors and accompanying punishments, whether they be corporal or other forms of punishment.

An equally important guideline is that there always should be a second school official present as a witness when administering corporal punishment. This person could be a teacher or another administrator. Having a witness present decreases the likelihood that the paddling will be seen later as some sort of vendetta against the student or that it has been inflicted on the basis of a personal whim. Moreover, it is important to have a "friendly" witness who can testify as to the "reasonableness" of the punishment in the event the student or parents initiate litigation – which does happen in today's litigious society.

Students also should be informed about the specific misbehavior that has resulted in the paddling. While this seems to be common

sense, the *Ingraham* Court indicated that providing students with this information is not constitutionally required. Nevertheless, it would be unwise for you to paddle students without first informing them as to why you are doing it.

Whether corporal punishment has been administered "reasonably" is a determination that is made on the basis of facts in each case. Accepted standards of the "reasonableness" of paddling will vary from community to community and also may vary among subgroups within the community. The district's discipline code should be flexible enough to allow you to be responsive to these realities. At the same time, the code must adequately protect students' constitutional rights. If paddlings are used in conformity with the district's discipline code, then the *Ingraham* guidelines protect students' interests. Keep in mind, however, that a number of litigation vehicles still survive, even after *Ingraham*, for challenging the principal's use of corporal punishment and its reasonableness, such as traditional tort assault-and-battery suits, Section 1983 suits, substantive due-process grounds, and equal-protection claims.

In any event, you need to exercise caution when administering paddlings, even when you have followed district policy to the letter. A disgruntled parent can make your life miserable. You may be sued in criminal as well as civil court, reported to child welfare authorities, and exposed to public criticism through the press. While your name may be cleared eventually, the incident can be a highly unpleasant ordeal – with potentially disastrous career consequences.

The highly emotional nature of corporal punishment makes it an issue that is all the more difficult to manage and resolve positively. In earlier times corporal punishment was commonly accepted by educators as a disciplinary measure. This is no longer the case. In fact, many educators today are strongly opposed to using corporal punishment under any circumstances. Moreover, the significant legal risks associated with using corporal punishment are formidable enough to cause you to discontinue its use as a student discipline measure, even where it survives as an officially sanctioned means of punishment.

Recommendations for Corporal Punishment

1. If you elect to use corporal punishment, remember that the risk of litigation is very real. Because it is such a controversial and emotionally laden issue, take care to assess community attitudes as well as state law and local policy on uses of corporal punishment. Only by being fully informed can you reduce the risk of litigation.

2. Corporal punishment should be limited to paddling. Strictly speaking, corporal punishment refers to any physical form of punishment. The courts, however, traditionally have frowned on more extreme forms of corporal punishment, such as striking students over the head or, as in one actual case, inserting straight pins into a student's arm.

3. Limit the number of swats used. As the number of blows inflicted increases, the presumption of "reasonableness" in your favor becomes much more difficult to defend. The number of blows administered will be directly considered when the courts evaluate the "reasonableness" of paddling. Never paddle a child whose handicaps or other physical infirmities might be exacerbated by the blows, leading to serious injury. Paddling a child who is small and frail is inherently more dangerous than paddling one who is large and strong. The force with which each blow is applied should be tempered accordingly.

4. Inform parents promptly. The time window should be stipulated by the student discipline code.

5. Although not constitutionally required, you should allow parents to request alternate forms of punishment for their children. Parents should be required to state their views in writing, and their statements should be kept on file. This positive practice allows parents to become involved in the discipline program.

6. Document all corporal punishment incidents fully. Include the name of the student, the name of the witness, the specific misbehavior resulting in punishment, when and how parents were notified, and any other related facts useful in constructing a defense in the event of litigation.

7. Make every effort to see that corporal punishment and all other aspects of the student discipline code are administered fairly. Racial, ethnic, or sexual biases are unacceptable. Equal and consistent administration of the student discipline code among teachers and among different buildings within the same district is essential.

8. With the declining acceptance of corporal punishment as a discipline measure, consider developing alternatives to corporal punishment and incorporate them into the student discipline code. Numerous non-corporal forms of punishment are available.

The Principal and Tort Liability

A tort is a wrong committed against one person by another, outside the criminal arena, for which the courts will award damages. In educational tort cases, the typical plaintiff is a student and/or parents and the typical defendants are the school system and its employees – including the principal. Of all the legal challenges that you may face, tort suits are perhaps the most dramatic – and also the most difficult to anticipate. Reducing the risk of tort liability suits is a responsibility facing every principal; failure to do so can have a devastating financial impact on schools and their employees.

There are several types of tort suits, but only two are likely to be encountered by the principal in the school setting: negligence torts and intentional torts. By far the most prominent of these two is negligence. To win a negligence suit, the plaintiff must establish four required elements: duty, breach of duty, injury, and proximate cause.

Courts have found that principals and other school employees have a legal duty to provide for the health and safety of their students. Duty is defined by an objective "reasonableness" standard; that is, what would the "reasonable principal" have done in the same circumstances? If your behavior falls below that of the hypothetical "reasonable principal" in the same situation, a breach of duty has occurred. To collect damages, the plaintiff must prove that an injury resulted from the principal's breach of duty. Finally, the breach of duty must be the proximate cause of the plaintiff's injury. While there may be many factors that contribute to a student's injury, a proximate cause is one for which the law holds the defendant responsible. If the plaintiff cannot establish even one of these four elements, the suit will be unsuccessful.

The success of a negligence suit will turn on the *foreseeability* of injury to a student as perceived by those responsible for ensuring the student's health and safety. Courts will examine two questions. First, could a reasonable principal in the same situation have fore-

seen the injury that occurred? Second, would the reasonable principal have acted to reduce the risk of that injury taking place? Thus the first step in avoiding negligence suits is taking whatever action is necessary to prevent student injuries from occurring in the first place.

There are a number of common law defenses to the negligence suit: contributory negligence, assumption of risk, comparative negligence, and "act of God." Each court jurisdiction defines these defenses differently, and you will need to understand each of them and how they are used under your state's law.

The contributory negligence defense asserts that the plaintiff contributed to his/her own injury to such an extent that the defendant should not be liable at all. States using this defense employ it as a bar to the plaintiff's suit. The assumption of risk defense asserts that, since the plaintiff voluntarily assumed the risk inherent in the activity that resulted in injury, the defendant should not be liable. Like the contributory negligence defense, the assumption of risk defense frequently operates as a complete bar to the plaintiff's recovering damages. Courts traditionally hold that youngsters under the age of seven are incapable of assuming any responsibility for their own actions. Unlike adults, they cannot voluntarily assume risks.

The comparative negligence defense argues that the defendant's liability ought to be lessened according to the respective proportional faults of each party. In a comparative negligence suit, for example, if the jury finds that there was $100,000 in total damages and that the student plaintiff was 30% negligent, the classroom teacher 30% negligent, and the principal 40% negligent, then the principal is only responsible for paying 40% of the total damages, or $40,000. Finally, the "act of God" defense takes the position that the injury to the student was totally unforeseeable and that no amount of effort on the part of school officials could have prevented the injury from taking place.

In addition to these four traditional defenses, many state legislatures have added a fifth, the sovereign immunity defense. If your state has enacted a form of sovereign immunity defense, this in itself may be enough to block a negligence suit. Since tort law is state-based, different states approach sovereign immunity differently. While the general trend in recent years has been to gradually abandon the defense, chiefly because of its questionable legal foundations, some states do maintain formidable immunity shields for political subdivisions and their employees. School districts along with municipali-

ties, counties, and the like are typically classified as political subdivisions for sovereign immunity purposes.

Common law recognizes three degrees of negligence: "slight," "ordinary," and "gross." All have continuing significance in today's sovereign immunity laws. The trend among states maintaining sovereign immunity is that "slight" and "ordinary" forms of negligent behavior by government employees are protected but "grossly" negligent behavior is not. In other words, if you are "grossly" negligent, that is, if you fail to use even slight care in a situation resulting in injury to a student, you will lose sovereign immunity protection and be left with only common law defenses.

Another frequent exception to the sovereign immunity defense is "scope of employment." Typically, sovereign immunity statutes will not protect you if your negligent behavior takes place outside the scope of your employment responsibilities. For example, if a child who is running to board a bus falls and is severely injured, you will be protected by sovereign immunity, even if you happened to be negligent in your supervision, since supervising the loading of buses is a duty "within the scope" of your employment. On the other hand, if you elect to transport students who have missed their bus to their homes in your car, and there is an accident en route resulting in injury to students, you will not be protected by sovereign immunity, since the activity you were engaged in at the time of the injury was not "within the scope" of your employment responsibilities.

The newest form of tort suit appearing on the educational scene is educational malpractice, in which school officials, including principals, are accused of having failed to fulfill their duty to educate students. This is a variant of the traditional negligence suit. Here, however, the concept of "duty" is defined as a duty to educate as opposed to a duty to ensure student health and safety. While there has never been a successful educational malpractice suit (other than those involving cases of misdiagnosis of handicaps or misplacement of special education students), some judges and others have been sympathetic to claims of students who never learned to read or write. Typically, these students assert that they have been inadequately instructed, resulting in failure. The students' argument is that school officials ought to be liable for their failures.

Courts rejecting educational malpractice claims have argued that if such suits were permitted, it would be disastrous for public schools and their employees. Legal experts disagree as to whether such

lawsuits will ever be successfully litigated other than in situations involving misdiagnosis and inappropriate placement.

Legislative tort liability protections for principals take two forms: mandatory (where the district is required to provide such protection) and permissive (where the district may provide liability protection but is not required to do so). The alternative approach to legislative tort liability protections is private liability insurance available from selected insurance companies.

Some states have taken the indemnification approach to lessen the impact of tort liability suits on principals. In these states, even if no mandatory liability insurance is required, districts are frequently required to assist employees with their legal defenses and to indemnify them if they are held liable.

Recommendations for Limiting Liability Risk

1. The first line of defense in limiting the risk of liability is effective supervision of school activities. As the chief on-site administrator, you bear the ultimate responsibility for supervising student activities. You will need to ensure that supervision is adequate before, during, and after school – on the playground, in the cafeteria, and in the hallways. The level of the supervision provided may need to be increased when younger students are involved and when the nature of the activities is such that the foreseeability of injury risks is heightened. Supervision on the playground, for example, must be more intensive than it is in the library.

2. As principal, you should provide inservice sessions on supervision for the teaching staff as well as for aides, student teachers, and volunteers who may be serving in the school. Providing such training not only improves the quality of supervision in the building and on the grounds but also helps protect you and the school from liability for negligence because of untrained personnel.

3. You will need to monitor those who are supervising students to ensure that they are in the proper places at the proper times and are actively supervising student behavior. The courts have found principals to be liable not only when they fail to adequately train school staff who are responsible for supervising student activities but when they fail to oversee these persons as well.

4. The presence of defective or dangerous equipment in the school is of utmost concern in reducing the risk of liability. As the on-site manager and supervisor, you have a duty to see that your facility is properly and safely maintained and that potentially dangerous con-

ditions are corrected. A monthly safety inspection is one means of locating unsafe or dangerous equipment. Asking staff to report instances of jammed doors, broken windows, and the like is also a useful practice.

5. Posted or verbal warnings indicating that dangerous conditions are present are not themselves sufficient to excuse school officials from liability in the event of student injury. Younger children can not necessarily read a posted warning. This is not to say that posted and verbal warnings are inappropriate, but they cannot be considered as a substitute for close supervision.

6. Elementary principals have an extra source of potential liability in the school playground. More elementary student injuries occur on playgrounds than in physical education classes. Some elementary school playgrounds may very well be tort liability nightmares waiting to happen. Swings, climbing apparatus, and slides are the most hazardous types of equipment. Youngsters playing on this kind of equipment need close supervision, and established safety rules must be enforced.

7. Each piece of playground equipment must be carefully selected to make sure it is appropriate for the age groups using it. Enclosing the playground equipment in a secured area is also advisable so that unsupervised youngsters cannot gain access. Padding metal surfaces and areas beneath equipment also will help to reduce injury risks. Periodic safety inspections of all playground equipment should be conducted. Youngsters should not be permitted to use broken equipment until repairs have been made.

8. Transporting students off school grounds for field trips and other activities enriches the curriculum but also creates unique tort liability problems for the principal. It is not possible to construct a clear rule for limiting liability risk because student injuries on field trips are so situation-specific. Beyond providing adequate supervision for the duration of the field trip, the principal shares in the school district's responsibility to provide adequately trained drivers and safe, reliable vehicles to transport students.

9. Parent permission slips for field trips offer no legal protections against a negligence claim if an accident should take place while students are being transported to field sites or are participating in school-sponsored activities off school grounds. In most states, parents can not waive the rights of their children to sue for and collect damages when negligence is proved. Neither can principals and teachers

abdicate their responsibility of meeting the standard of care imposed by the law. These forms really serve no legal purpose other than informing parents that their children will be involved in such an activity.

Special Education Law and the Elementary Principal

The handicapped rights movement began in the late 1960s with a series of court victories by parents of handicapped children and culminated in 1975 with the passage of Public Law 94-142, the Education for All Handicapped Children Act. One result of these events has been that the elementary principal has become deeply involved with special education responsibilities, many of which have legal overtones.

The basic provisions of P.L. 94-142 introduced a new lexicon to education – "free appropriate public education," "least restrictive environment," "extended school year," and "individualized education plan," to name a few. Moreover, the act has been the subject of detailed judicial scrutiny; and the courts, through their rulings, have imposed new requirements that have a direct impact on the work of the principal.

While the concept of free appropriate public education is central to special education law, the term is not precisely defined in P.L. 94-142 itself. As a result, the courts have stepped into the gap, attempting to provide a workable definition of the concept. The Supreme Court in *Board of Education* v. *Rowley* (1982) indicated that the phrase, "free appropriate public education," does not require a school district to "maximize" the educational opportunities of a handicapped child to the point where they are "commensurate" with those afforded non-handicapped students. Rather, handicapped students merely have to be afforded "some opportunity" to make educational progress. Assuming that the act's requirements are met, and the child in question is benefiting in some way from the placement described in the "individualized educational plan" or I.E.P., the Court indicated that the "free appropriate public education" requirement will be satisfied. However, school officials in no way can "write off" a handicapped student simply because they are unable to provide a free appropriate education with existing staff, facilities, and financial

resources. More than one judge has ruled that school officials must take affirmative steps to assist parents in obtaining an appropriate placement for their child outside the public schools if the schools cannot provide one.

In addition to the controversy surrounding the nature of the educational and related services provided under P.L. 94-142 to handicapped children, the extent to which these services will be provided has been widely litigated as well. One of the issues litigated is the extended school year for handicapped children. In the test case on this issue, *Battle* v. *Pennsylvania* (1981), the court ruled that for some handicapped students, continuously provided educational services, or at least the availability of services beyond the traditional 180-day school year, are necessary. In these situations, the school year must be extended to satisfy the free and appropriate requirement. The *Battle* court held that this determination is best made on a case-by-case basis, and later holdings have followed the *Battle* rationale.

Courts have imposed additional responsibilities on elementary school personnel by finding that schools must provide related services that are essential to ensure that handicapped students are able to attend schools and to benefit from educational opportunities. In *Irving Independent School District* v. *Tatro* (1984), the leading related-services case, the Supreme Court held that an elementary school was required to provide trained personnel to provide a handicapped student with catheterization several times a day so she could urinate. This service, the Court held, was essential to enable the child to attend school and have access to the educational program.

There were limitations in the *Tatro* holding. First, the Court indicated that to be eligible for related services, the child must first be identified as handicapped under P.L. 94-142. Second, the Court held that the district need provide only those related services necessary to assist the child in obtaining access to the educational program. This second restriction applies regardless of how easily the related service can be provided to the student during the school day.

P.L. 94-142 mandates that each handicapped child's free appropriate public education take place in the environment or setting that is the least restrictive possible. Under the act, separate educational programs for the handicapped will withstand judicial scrutiny only when the severity of the handicaps warrants them. The starting point in least restrictive environment cases is the concept of mainstreaming, which assumes that the regular classroom is the ideal learning setting or least restrictive environment for the handicapped child.

One notable least restrictive environment case is *Hawaii State Department of Education* v. *Katherine D* (1983). In this case the Ninth Circuit Court of Appeals held that a proposed I.E.P. recommending home instruction did not constitute a free appropriate public education under the act because it was not the least restrictive environment for the child. The child in the case had undergone a tracheotomy and needed regular suctioning. School officials concluded that they were unable to provide such services. The child's parents challenged the proposed home instruction placement in federal court. The appellate court sided with the parents, requiring the school to pay tuition for a private school placement where the child could receive the health services she required, including trained personnel to dispense medication, suction her lungs, and reinsert the tracheotomy tube when necessary.

Even though P.L. 94-142 displays a clear preference for mainstreaming for providing educational access for the handicapped child in the least restrictive environment, mainstreaming may not necessarily be an appropriate placement for every handicapped child. Some handicapped children need a more restrictive learning environment than the regular classroom. If the family of a particular handicapped child is able to convince a court that a more restrictive learning environment is necessary, a duty has been imposed on the district to assist the family in obtaining suitable placement.

Legal issues also accompany identification of handicapped students and writing I.E.P.s. The states have adopted detailed procedures dealing with identification and placement. While state laws must be consistent with P.L. 94-142, it is permissible for them to grant additional protections beyond the scope of the act. And school districts may have additional rules and procedures beyond those mandated under federal and state laws. Thus the principal's responsibilities in the area of identification and placement may differ somewhat from state to state and district to district. Obviously, you will need to have a working knowledge of the legal requirements imposed by P.L. 94-142 as well as by relevant state laws and local district policies.

P.L. 94-142 due-process protections for handicapped students are extensive. The intent of the act was to give parents a major role in the evaluation, placement, and programming of their children. These protections have been paralleled by similar state laws. Examples of due-process protections contained in the act include parental access to educational records for inspection purposes, the right to an independent evaluation of the child's functioning, and the right to have

a surrogate parent appointed to represent the best interests of the child.

The landmark special education due-process case is *Honig* v. *Doe* (1988). In this case the Supreme Court held that a student cannot be expelled as punishment for misbehavior if that misbehavior is a consequence of a handicapping condition. This is true even if the handicapped student poses a danger to himself/herself and to others. The Court suggested that less severe measures should be employed to effectively discipline handicapped students. One preferred disciplinary technique advocated by the Court is the use of short-term suspension as a "cooling off" period.

Another source of due-process protections for handicapped students is the act's extensive hearing provisions. While either side in a placement dispute can request an administrative hearing under the act, it most often is requested by parents who are dissatisfied with the school's proposed placement and I.E.P. When this happens, school officials may have to defend their proposals before a hearing officer. Careful preparation and planning is essential for a hearing. Selecting appropriate documents and witnesses, becoming familiar with all the facts in the case, and conducting a prehearing briefing are all essential steps in preparing for a successful administrative hearing.

Recommendations for Special Education

1. Because special education law is a relatively new area and because it tends to change so rapidly, you need to be especially diligent about keeping up to date. Develop a special education resource file where you can collect copies of court cases, administrative guidelines, and journal and newspaper articles relevant to special education law. Reading professional literature, discussing recent court holdings with the school district's attorney, and attending professional meetings on special education law are other ways to stay current.

2. If you have taken a new position in a different state or district, do not assume the "rules of the game" in your new locale are identical with those in the old, because special education laws and local policies may vary from state to state and from district to district.

3. Because of your leadership role, you must be an active player in the special education arena. In this role, you will have to act promptly when individual teachers or evaluation teams refer students for special education placement and services, replying in writing to all referral requests. Your ongoing involvement is essential in maintaining the morale of special education teachers, who face very challenging

jobs. These teachers must perceive you as a person who can advise, assist, and support them in their daily efforts.

4. Controversies over student placements in special education arise frequently because of the tests used as a basis for the placement. Learning disabilities assessment, for example, is a particularly nebulous area. Since a district's choice of tests used for placements could be challenged in court, it is important that you be familiar with the validity and reliability of the tests used as well as their appropriateness for placement purposes. No school official involved in special education identification and placement procedures should defer automatically to the views of others as to the appropriateness of a given assessment method. A "total deference" position affords slim grounds for a defense if you are challenged on your testing practices.

5. Remember that handicapped students are entitled to an education in the least restrictive environment, even if it requires providing supplementary training for school personnel or hiring specialists to meet an individual child's special needs. Determining the least restrictive environment must be made on a case-by-case basis. School officials must take into account all relevant information when developing an I.E.P. that will withstand judicial scrutiny in the event of a parental challenge.

6. If you are asked to appear as a witness at an administrative hearing on a special education case, you should insist on being thoroughly briefed by the school district's case presenter or attorney. While the district is preparing for an administrative hearing, you should not discuss legal matters with the parents of a handicapped child. These matters are best left to the hearing process, with all legal questions being relayed to the case presenter or to the school district's attorney. Regardless of the circumstances, you must avoid becoming defensive or hostile during questioning. When being questioned in an area in which you have less experience or expertise than other school district witnesses, you should defer to the expertise of those witnesses.

7. Since parents likely will harbor resentment toward the school and its officials, maintaining a non-adversarial relationship with handicapped students and their parents during the hearing process will be a test of your professionalism. Regardless of the outcome of the hearing, if you have maintained a working relationship with parents, then you will be in a better position to re-establish communication with them and to follow through with whatever recommendations the hearing officer has issued.

Legal Issues and the Non-Traditional Family

In 1955, 60% of American households were so-called traditional families, defined as two married parents with children living in the same dwelling and where the father worked full time and the mother was a homemaker. Thirty years later the proportion of traditional families has dwindled to a mere 7%. The remaining households constitute what have come to be called "non-traditional" families. The most common type is the one-parent (usually the mother) family resulting from divorce, separation, or abandonment. Other types are the step-parent family, the "blended" family, and the single-parent family where the mother has never married.

The changing nature of American family structures presents a variety of challenges to educators, including several legal issues. Principals, in particular, have had to become knowledgeable about such legal matters as access to student records, custody issues, and other judicial involvements affecting the daily operations of a school.

Access to student records is an important concern in our dealings with both traditional and non-traditional families. The leading federal legislation in this area is the Family Educational Rights and Privacy Act (FERPA), enacted by Congress in 1974. Prior to 1974, educators commonly denied parents access to their children's educational records for a variety of reasons, including cost factors, time restraints, and liability concerns. At the same time, educators routinely granted third-party access to these same records. Enactment of FERPA imposed additional burdens on schools. Congress clearly felt, however, that these burdens were outweighed by the rights of parents and students to have access to their educational records. At the same time, FERPA restricts third-party access to educational records.

FERPA is applicable to all students, including handicapped students, enrolled in any public school receiving federal funds. FERPA gives students over 18 the right to inspect their educational records as well.

If the student or his/her parents dispute the content of the records, they have the right to request that the agency amend them.

Some school records are not considered "educational" under FERPA and are thus protected from disclosure to students and parents. Excluded are private records maintained by teachers in their sole possession and not revealed to any other person (these records may be shared with a substitute teacher and still be excluded from disclosure to parents and students). Also excluded are law-enforcement records kept by the principal at school – if these records are maintained separately and have not been made available to anyone else in or outside the school. Finally, reports by physicians, psychologists, or other professionals on students under their care do not fall under FERPA's disclosure provisions if they are not made available to any other persons. The only exception to this last exclusion is that students over 18 years old can request access.

Although, under FERPA, you are not required to give students under age 18 access to their educational records, you may choose to do so without violating the law. And the law makes no distinction between students under the age of 18 still enrolled in your school and those no longer enrolled.

Although FERPA has been in place for more than 15 years, there is some question as to how closely individual schools conform to it. A 1985 study, for example, concluded that some schools apparently follow FERPA very closely while others largely disregard the law. This variation in administrative practice indicates that some principals may be unaware or confused about its provisions. For example, one finding from the study was that 75% of the principals believed that non-custodial parents have no right to access to their children's educational records under FERPA, a belief directly contrary to federal law.

Another practice apparently still being followed in some schools is that law-enforcement officers routinely are granted access to educational records by school officials. This is a clear violation of federal law. The only time such access is permitted under FERPA is when law-enforcement officials can demonstrate that a sufficiently strong relationship exists between information in a student's records and some health or safety concerns so as to override FERPA restrictions. Even once this relationship is shown, strict guidelines still control access.

With the increasing incidence of divorce, child-custody disputes frequently spill over into the schools; and principals can easily be drawn into these disputes. Custody issues are likely to arise any time

a child's academic or behavioral problems require involvement of parents. Therefore, it is incumbent on schools to develop policies and procedures that define both parental and school responsibilities and provide ground rules for home/school interaction.

In a divorce, courts typically award legal custody to one parent, usually the mother. However, a child's custody status depends on the stage of the parents' divorce proceedings. If parents are in the process of divorcing but are not yet legally divorced, both still have equal rights and powers in any decisions affecting the child. The exception to this arises if there is a court order that restricts one parent's rights.

Typically, there is a separation agreement that governs parental interactions until divorce proceedings are completed. Under most state laws, the separation agreement issued under the court's authority addresses child custody during the period prior to the issuance of a final divorce decree. If you do not have a court order on file restricting access to only one parent, you should rely on the separation agreement's custody provisions. You should routinely require that a copy of the separation agreement's custody arrangements be supplied for this purpose.

If you are in a state recognizing common-law marriages, the custody picture becomes more complicated. To establish a common-law marriage, both partners must verbally agree that they are married, the partners must live together, they must be viewed in the community as being married, and they must have indicated to others in the community in the past that they were married. If the parents of a child have a common-law marriage, the school is legally entitled to afford both parents rights identical to those of parents in a traditional marriage. If there is a disagreement, however, as to whether a common-law marriage actually exists between the two parents, the school should recognize only the mother of the child as possessing custodial rights until legal proceedings are completed.

If the parents have never married and do not claim a common-law marriage, the mother traditionally has full custodial rights and powers if there is no court order that modifies such an arrangement. If persons other than the biological parents of the child are appointed as legal guardians in a court proceeding, these persons have the same rights that a custodial parent enjoys.

There are a number of ways that post-divorce custody can be arranged. By far the most common is sole custody, where only one parent has the exclusive right to make decisions about the care, con-

trol, and day-to-day activities of the child. This broad grant of authority includes the exclusive right to make decisions regarding the child's education.

Joint custody, a less-common arrangement, gives both parents equal rights over the care, control, and day-to-day activities of the child. In joint-custody states, the plan is incorporated into the court order itself. In a joint-custody situation, you will need to request a copy of the court order and review its provisions to determine if either parent is granted exclusive authority to make educational decisions.

With a court order or any other document from a court proceeding that could influence the interaction between parents and the school, you should insist that any proof of changes in a child's custody status be presented in writing before they will be recognized. Copies of all relevant documents must be supplied for school files. Courts have indicated that schools have a right to rely on information made available to them. However, you are under no obligation to recognize changes in custody status until you have been given appropriate notification.

By requiring parents to supply certified copies of divorce decrees, custody arrangements, and subsequent modifications to these documents, you are shifting the responsibility for keeping the school informed to the parents. This reduces liability that might otherwise result if you unknowingly violate a court order. If you suspect there is a more recent court order than the one provided, you can easily check its status with the local domestic relations court. The court clerk can trace any subsequent modifications in court orders when you supply the case number from the original in your files.

Court orders are useful in that they clarify not only custody arrangements but also observation, access, and parental participation rights in the activities of their children. Even so, a court order can place you in a difficult situation at times. For example, if a court order denies a non-custodial parent access to school records and forbids the parent from attending school events in which the child is participating, you will have to deny that parent admittance to the school. In such a situation, you should explain to the parent that you are acting in accordance with the court's order and that if the parent refuses to abide by it, you will have to call the police. Failing to enforce the order might result in contempt charges as well as liability for failing to uphold the court's order.

Recommendations for Legal Issues Related to Non-Traditional Families

1. In the absence of a court order to the contrary, allow non-custodial parents full access to their children's educational records, as provided by FERPA, and full opportunity to participate in school-sponsored events in which the child is involved. In the absence of a contrary court order, you have the discretion to allow non-custodial parents to have contact with their children on school property.

2. The education and personal development of the child is enhanced by having both parents involved in the educational process, regardless of the child's custodial status. Unless restricted by court order, both parents should be encouraged to participate in the school activities of their children. However, when divorced parents carry their disagreements to the school, then you have a right and obligation to exclude them from school activities.

3. When you have questions or concerns about the marital and/or custodial status of the parents of a particular child, require the custodial parent's written consent before allowing the non-custodial parent direct access to the child. The law requires that you defer to the wishes of the custodial parent in this area.

4. Under the laws of most states, only the custodial parent can make decisions regarding the child's health care unless the divorce decree provides otherwise. Elementary schools commonly use emergency health-care consent forms that have provisions informing relatives if a medical emergency involving a child arises. The custodial parent has the authority to exclude the non-custodial parent from notification in medical emergency situations. If the custodial parent specifically indicates that the non-custodial parent is not to be informed in the event of a medical emergency, the form should clearly indicate this intention in writing. If this intention is so indicated, you should not contact the non-custodial parent.

5. The school may release a child during school time only to a custodial parent or someone specifically designated by that parent. The non-custodial parent may be designated or excluded, depending on the custodial parent's wishes. If the custodial parent has indicated that the child shall not be released to the non-custodial parent, you face potential liability if you do so. Keep on file a list of children whose parents have restricted their release. This list should be made available to school personnel, such as the secretary, who normally handle releasing students during the school day.

6. Both parents should be invited to attend the same parent-teacher conference. Many divorced couples are able to participate constructively in these conferences. However, if parental bickering and resentment preclude constructive joint participation, you should schedule separate conferences for each parent. While only the custodial parent may make decisions regarding the child's education, the custodial parent cannot exclude the non-custodial parent from participating in parent-teacher conferences unless there is a court order to that effect.

7. In disciplinary conferences, invite only the custodial parent to attend. The custodial parent has exclusive decision-making power concerning his/her child's disciplinary infractions – including the exclusive right to decide whether to appeal the child's suspension or expulsion. Frequently, the child's discipline problems may be a consequence of parental infighting and emotional upheaval. While involving both parents in disciplinary matters concerning their child is certainly advantageous, inviting the non-custodial parent to attend disciplinary conferences must be left to the discretion of the custodial parent.

8. Having a set of policies, preferably developed at the district level, will make it much easier to handle the sometimes volatile situations involving non-traditional families. If such policies are not available at the district level, you should take the initiative and develop your own at the building level. At the same time, you can encourage the superintendent and board of education to adopt such policies. A uniform set of policies for handling these problems throughout the district will help to clarify expectations and responsibilities and also reduce liability risks.

Continuing Litigation Risks

Continuing risks of litigation are a fact of life for the elementary principal. For example, you or one of your staff may be served with a subpoena to testify in a child-custody suit or other dispute. When this happens, you should immediately contact the school district's legal counsel, who can assist in preparing you or your staff for a court appearance. It is possible that the school district's attorney can intervene and minimize your involvement in the case.

If you are named as a defendant in a suit, you should seek legal advice independent of that provided for the school district. Attorneys bringing such suits likely will name a number of defendants, including teachers, the principal, the superintendent, individual board members, and the school district itself. Attorneys employed by the district are obligated by their Code of Professional Conduct to look out first for the legal interests of their primary employers, the district and the board of education – and not necessarily those of individual school employees.

In some situations, the legal interests of the district may be hostile to yours. In some states, for example, the school district is excused from liability in corporal punishment cases if it can be shown that you acted beyond the scope of your employment responsibilities when you administered the paddling. The same general rule applies if the charge is made that the student was paddled in a "wanton" manner, with an intent to inflict pain or physical injury maliciously. In these situations, it may be in the district's best legal interest to distance itself from its employee. If you are named as a defendant in such a situation, you should obtain your own independent counsel to help you prepare your defense strategy.

One writer has suggested that there is a better than 50% chance that a principal beginning his or her career today will be involved directly in at least one school-related lawsuit by the time he or she reaches retirement. The legal issues discussed in this booklet are by

no means the only ones the principal may encounter on the job, but they are the most critical. An understanding of them must be pursued with vigilance, updated and renewed with determination, and remembered in practice. Knowledge of the law is essential in keeping the elementary principal's career on track – and in keeping the elementary principal out of court.

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